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JOHN F. DA

IN THE

Supreme Court of the United States

October Term, 1965.

PEOPLE OF THE STATE OF CALIFORNIA, Petitioner,
No. 584. *v.*
ROY ALLEN STEWART, Respondent.
On Writ of Certiorari to the Supreme Court of the State of California.

ERNEST ARTHUR MIRANDA, Petitioner,
No. 759. *v.*
THE STATE OF ARIZONA, Respondent.
On Writ of Certiorari to the Supreme Court of the State of Arizona.

MICHAEL VIGNERA, Petitioner,
No. 760. *v.*
PEOPLE OF THE STATE OF NEW YORK, Respondent.
On Writ of Certiorari to the Court of Appeals of the State of New York.

CARL CALVIN WESTOVER, Petitioner,
No. 761. *v.*
UINTED STATES OF AMERICA, Respondent.
On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

SYLVESTER JOHNSON and STANLEY CASSIDY, Petitioners,
No. 762. *v.*
STATE OF NEW JERSEY, Respondent.
On Writ of Certiorari to the Supreme Court of the State of New Jersey.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE.

Of Counsel:
RAYMOND J. BRADLEY,
H. ROBERT FIEBACH,
12th Floor, Packard Bldg.,
Philadelphia, Pa. 19102
PETER HEARN,
2001 Fidelity-Philadelphia Trust Bldg.,
Philadelphia, Pa. 19109
MELVIN L. WULF,
156 Fifth Avenue,
New York, N. Y. 10010

ANTHONY G. AMSTERDAM,
PAUL J. MISHKIN,
3400 Chestnut Street,
Philadelphia, Pa. 19104
Attorneys for Amicus Curiae.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

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INTEREST OF AMICUS.

The American Civil Liberties Union has engaged solely in the defense of the Bill of Rights for more than forty-five years. Much of its energies have been directed toward effectuating the provisions of the Bill of Rights concerned with the administration of criminal justice.

Effectuation of a man's right not to be compelled to incriminate himself is essential to the preservation of our accusatorial system of criminal justice. The American Civil Liberties Union believes that such effectuation can be achieved by proper application of this Court's decision in *Escobedo v. Illinois,* 378 U. S. 478 (1965). This is just the issue presented in these cases. The briefs for the parties have directed attention to the particular facts of each case. Your Amicus believes it can best serve the Court by presenting a more general argument addressed to the theory and application of *Escobedo.*[1]

1. The attorneys for the parties involved have consented to the filing of this brief. The letters of consent are on file with the Clerk.

SUMMARY OF ARGUMENT.

In *Escobedo v. Illinois*, 378 U. S. 478 (1965), this Court held that the privilege against self-incrimination was violated when an accused's confession was obtained through police in-custody interrogation designed to elicit incriminating statements from him at a time when he was denied the presence of counsel, since the presence of counsel was necessary to protect the constitutional privilege. In so holding, the Court reached the natural culmination of its "involuntary" confession decisions, in light of its application of the privilege against self-incrimination to the States. The determination that *Escobedo* rests upon effective enforcement of the privilege against self-incrimination is not of mere academic interest, but vitally affects the proper application of the decision.

There can be no doubt that police custodial interrogation designed to elicit a confession is inherently violative of the privilege against self-incrimination. Therefore confessions obtained under such circumstances cannot be constitutionally admitted in State or federal criminal proceedings unless it has been shown that adequate safeguards were present to protect the privilege. For reasons spelled out at length in the brief, under the present circumstances of police custodial interrogation designed to elicit a confession, the required safeguard is the presence of counsel.

A police warning of the subject's right to remain silent is not adequate. Neither is the granting of prior access to counsel, as distinguished from the presence of counsel. For these reasons it is immaterial that a subject of police custodial interrogation asked for or was able to obtain retained counsel. Effectuation of the privilege against self-incrimination, in these circumstances, requires the providing of counsel to all.

This does not mean that the effectuation of the privilege requires the presence of counsel in other than police

custodial interrogation designed to elicit a confession. Nor does it mean that if other protective devices are devised and put into effect which effectively secure the privilege even in the police custodial situation, the presence of counsel would still be required. A holding that, under the conditions of police interrogation as they normally exist today, the presence of counsel is necessary to protect the privilege against self-incrimination, should not foreclose a determination that other protective devices are acceptable when and if such devices are put into effective use.

Finally, the Court must reject the argument that the privilege against self-incrimination should not be enforced in the face of a police "need" for its non-enforcement. Even if such "need" conflicting with the privilege were shown to exist, the Constitution requires that the conflict be resolved in favor of effective enforcement of the constitutional privilege. However, this issue need not be reached as the asserted police "need" has not been shown to exist and the burden of production of evidence clearly rests on the prosecution. Not only have prosecutors not produced any convincing evidence, the assertions which they make are not even supported by considered legislative determinations of police need. Thus in a scale which opposes unsupported assertions of necessity by police and prosecutors on the one side, and effectuation of the individual's constitutional right not to be compelled to incriminate himself on the other, the balance must be struck on the side of the constitutional right.

ARGUMENT.

I.

Escobedo v. Illinois Held That the Privilege Against Self-Incrimination Was Violated by Obtaining a Man's Confession Through Police Interrogation Designed to Elicit Incriminating Statements at a Time When He Was in Custody and Was Denied the Presence of Counsel, Since Counsel Was Necessary to Dispel the Inherently Compelling Atmosphere of Such Interrogation.

A. The Facts and Setting of *Escobedo*.

The *Escobedo* opinion itself placed great emphasis on the facts of the case, and it is appropriate that the analysis of the implications of that decision begin with an examination of these facts. Danny Escobedo, a 22-year-old, of Mexican extraction, with no record of previous experience with the police, was arrested and taken handcuffed to police headquarters for interrogation in connection with the fatal shooting of his brother-in-law. Throughout the entire interrogation, Escobedo was repeatedly told that the police had convincing evidence that he had fired the fatal shots. During the interrogation he was cut off from all contact with the outside world despite his repeated requests to see his retained attorney, who was at the police station attempting to see him. Requests of both Escobedo and his attorney to see each other were continually denied by the police. At one point, Escobedo and his attorney came into each other's view for a few moments but the attorney was quickly ushered away. Escobedo overheard a detective telling his attorney that he could see Escobedo when they were finished interrogating him. During the entire interrogation Escobedo "was handcuffed" in a standing position, he "was nervous, he had circles under his eyes and

he was upset" and he was "agitated" because "he had not slept well in over a week."

Despite all this, Escobedo did not "crack" until confronted with an alleged accomplice who stated that Escobedo had fired the fatal shots. To this Escobedo replied that he hadn't shot the deceased, the accomplice had. In this way, Escobedo, for the first time, admitted to some knowledge of the crime. After that "crack", he made additional statements implicating himself in the murder plot. At this point an Assistant State's Attorney was summoned "to take" his statement. He was an experienced lawyer who was assigned to the homicide division to take "statements" from prisoners in custody and who "took" Escobedo's statement by asking carefully framed questions. Neither at this time nor at any other point in the interrogation had anyone warned Escobedo of his constitutional right not to be compelled to incriminate himself.

B. The Rationale of *Escobedo:* Effectuation of the Right Not to Be Compelled to Incriminate Oneself.

On these facts, this Court held that during his interrogation Escobedo had been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as made obligatory upon the States by the Fourteenth Amendment, and thus the incriminatory statement elicited during this interrogation could not be used against him at his criminal trial.

In holding that Escobedo had been denied his Sixth Amendment right to counsel the Court relied on the facts that he had been extensively interrogated where the "purpose of the interogation was to 'get him' to confess his guilt despite his constitutional right not to do so. At the time of his arrest and throughout the course of the interrogation, the police told [Escobedo] that they had convincing evidence that he had fired the fatal shots. Without informing him of his absolute right to remain silent in the

face of this accusation, the police urged him to make a statement." 378 U. S., at 485.

The facts of the case were, therefore, remarkably similar to these involved in *Bram v. United States,* 168 U. S. 532 (1897), where almost seventy years ago this Court held that such an incriminating statement had been elicited in violation of the suspect's Fifth Amendment right not to be compelled to incriminate himself. Indeed, the Court in *Escobedo,* 378 U. S., at 485-486, relied on and quoted the following language of *Bram:*

> "It cannot be doubted that, placed in the position in which the accused was when the statement was made to him that the other suspected person had charged him with crime, the result was to produce upon his mind the fear that if he remained silent it would be considered an admission of guilt, and therefore render certain his being committed for trial as the guilty person, and it cannot be conceived that the converse impression would not also have naturally arisen, that by denying there was hope of removing the suspicion from himself." *Bram v. United States,* 168 U. S. 532, 562.

In discussing the significance of counsel during police interrogation of a suspect in custody, and the possible effect of counsel's presence on the alleged police "need" to obtain confessions, the Court stated: "Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination." 378 U. S., at 488.

The Court went on to point out that "[w]e have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation. As Dean Wigmore so wisely said:

> '*[A]ny system of administration which permits the prosecution to trust habitually to compulsory self-*

> *disclosure as a source of proof must itself suffer morally thereby.* The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer,—that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized.' 8 Wigmore, Evidence (3d ed. 1940), 309. (Emphasis in original.)" 378 U. S., at 488-89.

It thus seems clear that the Court held that Escobedo had been denied his right to the Assistance of Counsel because, under the circumstances of that case, providing counsel to Escobedo was necessary to protect effectively his basic right not to be compelled to incriminate himself. The fundamental quality of the privilege against self-incrimination is emphasized by considering the independent significance of the two rights. The privilege against self-incrimination is so central to our system of justice, that it is hard to conceive of our society without it; yet, it would seem fair to say that if there were no such privilege, *Escobedo* might well have come to a different result.[2] On

2. Put on a straight right to counsel approach, *cf., Massiah v. United States,* 377 U. S. 201 (1964), it might well be doubtful that police interrogation would constitute a "critical stage" absent the self-incrimination privilege. *Cf. White v. Maryland,* 373 U. S. 59 (1963); *Hamilton v. Alabama,* 368 U. S. 52 (1961). While it might be argued that, even absent the privilege against self-incrimination, *Escobedo* could still have been put on "involuntary" confession grounds, *cf. Haynes v. Washington,* 373 U. S. 503 (1963), it again seems doubtful that, absent the privilege, the "involuntary" confession cases would have proceeded to the point expressed in *Haynes.* See *Malloy v. Hogan,* 378 U. S. 1, 7 (1964).

the other hand, it seems clear that the absence of a right to counsel should have had no effect on the result; in the circumstances of *Escobedo*, the privilege against self-incrimination required the presence of counsel for its effectuation.

Such a marriage of the Fifth Amendment privilege and Sixth Amendment right to counsel (as made applicable by the Fourteenth Amendment) is not unique to *Escobedo*. The Court has often recognized the fact that the Assistance of Counsel is necessary to protect effectively other constitutional rights. For example, in *Ferguson v. Georgia*, 365 U. S. 570 (1961), the Court held that a defendant was denied the effective assistance of counsel when counsel was necessary in order to enforce effectively his right to testify on his own behalf. Similarly, in *Townsend v. Burke*, 334 U. S. 736 (1948), this Court held that a defendant had been denied the effective assistance of counsel at sentencing when the presence of counsel was necessary to protect him against the possibility that the prosecution had purposefully submitted misinformation to the sentencing judge. Of particular relevance to the problem of *Escobedo* is the long series of "involuntary" confession cases in which the Court has stressed the fact that the suspect did not have the assistance of counsel during the interrogation. See, e.g., *Chambers v. Florida*, 309 U. S. 227 (1940); *Ashcraft v. Tennessee*, 322 U. S. 143 (1944); *Haley v. Ohio*, 332 U. S. 596 (1948); *Fikes v. Alabama*, 352 U. S. 191 (1957); *Spano v. New York*, 360 U. S. 315 (1959); *Culombe v. Connecticut*, 367 U. S. 568 (1961); *Gallegos v. Colorado*, 370 U. S. 49 (1962); *Haynes v. Washington*, 373 U. S. 503 (1963).

And, just this past Term, the Court merged a defendant's right to counsel with his right to be confronted with the witnesses against him. In *Pointer v. Texas*, 380 U. S. 400 (1965), the Court held that the use at trial of a transcript of a witness's testimony taken at a preliminary hearing at which the defendant did not have counsel violated the petitioner's right to confrontation because the

statement of the witness used "against petitioner at his trial had not been taken at a time and under circumstances affording petitioner through counsel an adequate opportunity to cross-examine" the witness. 380 U. S., at 407.

Similarly, the use of his confession against Escobedo at his trial violated his constitutional rights since it was taken at a time and under circumstances where the lack of the effective assistance of counsel rendered completely nugatory his right not to be compelled to incriminate himself.[3]

The difference between this approach to *Escobedo* and one that concentrates solely on an isolated right to counsel is not only of academic interest; it vitally concerns the proper application of the decision. The view that concentrates on the right to counsel necessarily is directed to an inquiry as to when such right attaches. One way of approaching this is to attempt to discover a point in time or stage in the process for such attachment. Before that point is reached *Escobedo* has no application; after it is reached, *Escobedo* requires counsel. It is submitted that such an all or nothing approach may go both too far and not far enough. A rigid requirement of providing counsel under any and all circumstances after the crucial point in time is reached, may require the provision of counsel under circumstances where counsel is not necessary to the effectuation of a person's right not to be compelled to incrimi-

3. This, of course, does not mean that the Sixth Amendment right to counsel has no operative effect other than to enforce effectively other constitutional rights. It is clear that the Sixth Amendment does have independent operative effects both at trial, see *Gideon v. Wainwright*, 372 U. S. 335 (1963), and before trial, see *White v. Maryland*, 373 U. S. 59 (1963); *Hamilton v. Alabama*, 368 U. S. 52 (1961); *Massiah v. United States*, 377 U. S. 201 (1964); *McLeod v. Ohio*, 381 U. S. 356 (1965). It is submitted, however, that, in light of the analysis contained in this brief, it is not now necessary to determine the extent of this independent right to counsel beyond the situations represented by the above cases. *Cf. In re Newbern*, 55 Cal. 2d 508, 11 Cal. Rptr. 551, 360 P. 2d 47 (1961); *Winston v. Commonwealth*, 188 Va. 386, 49 S. E. 2d 611 (1948).

nate himself. Moreover, it might stifle desirable reform in State law or police practices aimed at the possibility of effectuating this right through means other than providing counsel. On the other hand the counsel-or-nothing approach may result in not providing adequate protection when it is found that the point in time at which the right to counsel attaches has not been reached, although the danger of compelled self-incrimination looms large. Indeed, the knowledge that counsel must be provided if this crucial point in time is found to have been reached may make courts reluctant to make such a finding when the assistance of counsel does not seem to be a feasible requirement. Yet, these may very well be cases where the effectuation of a person's right not to be compelled to incriminate himself requires protection, though protection other than through the assistance of counsel.[4]

Another possible counsel theory of *Escobedo* is an approach that makes the providing of counsel dependent upon the circumstances of the interrogation. If this view is taken, however, the issue then really becomes the effectuation, during the interrogation, of the Fifth Amendment right. This is just the approach advocated in this brief.

If, therefore, *Escobedo* rests upon effectuation of a person's right not to be compelled to incriminate himself, resolution of the issues here presented concerning its application require an analysis of this right and how it must be effectuated in the context of police investigation. We, therefore, turn to these issues.

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4. *Massiah v. United States,* 377 U. S. 201 (1964) apparently holds that indictment is an absolute point at which the right to counsel attaches. *Cf. McLeod v. Ohio,* 381 U. S. 356 (1965). The selection of indictment as an absolute point is, however, supportable on the basis of the theory of an indictment: that the government has prior to that time completed its investigation and made its basic case. Moreover, the accused's need for trial preparation—and the assistance of counsel therein—has then become established.

C. The Privilege Against Self-Incrimination in the Station House.

As this Court has only recently stated:

"[The privilege against self-incrimination] reflects many of our fundamental values and most noble aspirations: . . . our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,' . . .; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' . . .; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty' is often 'a protection to the innocent.'" *Murphy v. Waterfront Commission,* 378 U. S. 52, 55 (1964).

This Court has recognized "that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendent privilege is its essential mainstay. . . . Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured. . . . The Fourteenth Amendment secures against State invasion the same privilege that the Fifth Amendment guarantees against federal infringement—*the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will.* . . ." *Malloy v. Hogan,* 378 U. S. 1, 7-8 (1964). (Emphasis added.)

There can be today no doubt that "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will" applies in the context of police interrogation, state or federal. Almost seventy years ago this Court held in *Bram v. United States,* 168 U. S., at 542 (1897) that "[i]n criminal trials, in the Courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'" *Cf. Shotwell Mfg. Co. v. United States,* 371 U. S. 341 (1963); *Albertson v. Subversive Activities Control Board,* 86 S. Ct. 194 (1965).

Although it was not until two years ago in *Malloy v. Hogan,* 378 U. S. 1 (1964), that the Court held that the Fifth Amendment as such applied to the States, the Court in *Malloy* recognized and relied upon the fact that, even prior to this decision, there had been a "marked shift" to the Fifth Amendment federal standard in State "involuntary" confession cases. "The shift reflects recognition that the American system of criminal prosecution is accustorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay." *Malloy v. Hogan, supra,* at 7.

With the decision in *Malloy,* it is now absolutely clear that the Fifth Amendment right not to be compelled to incriminate oneself operates, through application by the Fourteenth Amendment, in the context of State police interrogation with the same force and effect as it does directly in the context of federal police interrogation.

D. Typical Police Custodial Interrogation Designed to Elicit a Confession Is Inherently Compelling.

It seems hardly necessary to argue at length that typical police custodial interrogation designed to elicit a confession is inherently compelling—inherently violative of

the subject's privilege against self-incrimination. The subject is arrested and held incommunicado by the police until they are finished interrogating him. He is completely within their control, surrounded by hostile forces, and cut off—except at the whim of the police—from any contact with the outside world that might give him support. Indeed, such a situation may well have been created for the explicit purpose of making the subject confess against his will.

This purpose and the effectiveness of incommunicado interrogation in achieving the purpose have been recognized by the leading writers on police interrogation techniques. INBAU & REID, CRIMINAL INTERROGATION AND CONFESSIONS, (1962) (hereinafter cited as INBAU & REID) states that "[t]he principal psychological factor contributing to a successful interrogation is *privacy*—being alone with the person under interrogation." (Emphasis in the original). O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 99 (1959) (hereinafter cited as O'HARA) emphasizes this point and explains the reasons:

> "If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions of criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law."

Both of these books as well as numerous other police manuals present varied and sophisticated methods to be used by police interrogators in extracting confessions through incommunicado custodial interrogation. The basic

theme of these works is well summed up in the following language of INBAU & REID, LIE DETECTION AND CRIMINAL INTERROGATION 185 (3rd ed. 1953):

> "[T]he interrogator's task is somewhat akin to that of a hunter stalking his game. Each must patiently maneuver himself or his quarry into a position from which the desired object [obtaining a confession] may be obtained . . ."

Their basic attitude is one of getting the subject [quarry] to confess despite himself—by trapping him into it, by deceiving him, or by more direct means of overbearing his will. Since it is impossible to set forth here at length the scope of these recommended police techniques, we shall only try here to highlight some of them. In addition, we have attached a chapter from O'HARA as an Appendix to this brief. We believe that this chapter is a fair sample of this book as well as of other interrogation manuals widely used and respected in police circles.[5]

A key element in police interrogation, as demonstrated by *Escobedo* and numerous other cases, is the manifestation by the police interrogator that he expects to obtain a confession from the suspect and that he is prepared to interrogate, under incommunicado circumstances, until he does. Thus *Escobedo* was not to see his attorney until the police were "done". 378 U. S. at 482. *Cf. Haynes v. Washington*, 373 U. S. 503 (1963). He was also consistently told throughout the interrogation that they had convincing evidence that he had fired the fatal shots. Both of these are recognized and recommended interrogation techniques. The first interrogation tactic recommended by INBAU & REID is: "Display an Air of Confidence in the Suspect's Guilt." p. 23.

5. This brief makes frequent use of police interrogation manuals as evidence of police interrogation practices since it is impossible to document actual practices by other means. It should be kept in mind, however, that the manual practices probably represent the most enlightened, and the least objectionable, standards of actual police work.

This "air of confidence" is to be used along with patience and persistence. p. 108. "Not only must the interrogator have patience, but he must also display it. It is well, therefore, to get the idea across, in most case situations that the interrogator has 'all the time in the world.' " p. 109.

O'HARA, after setting forth various "stratagems" to compel incriminating statements makes the following recommendation of "perseverance":

> "In the preceding paragraphs emphasis has been placed on kindness and stratagems. The investigator will, however, encounter many situations where the sheer weight of his personality will be the deciding factor. Where emotional appeals and tricks are employed to no avail, he must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without a relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours pausing only for the subject's necessities in acknowledgment of the need to avoid a charge of duress that can be technically substantiated. In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination. It is possible in this way to induce the subject to talk without resorting to duress or coercion. This method should be used only when the guilt of the subject appears highly probable." p. 12.

Can there be any doubt that under such circumstances many "subjects" of police interrogation will assume that the police have a right to an answer, and, indeed, to what the police regard as the "correct" answer—a confession of guilt? *Cf.* 8 WIGMORE, EVIDENCE 309 (3rd ed. 1940); DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 26-27 (1960): "It is probable that even today, when there is much less

ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman, *or at least that it will be the worse for you if you do not.*" (Emphasis added.) The whole purpose of such interrogation is to produce in the subject "the fear that if he remained silent it would be considered an admission of guilt", *Bram v. United States,* 168 U. S. 532, 562 (1897), or indeed, that it might otherwise be "worse" for him.

INBAU & REID, pp. 111-112, recommends an "effective way to deal with a subject" who, despite all other pressures, has the knowledge of and the gall to insist upon his right not to be compelled to incriminate himself or asks to see a relative, friend or attorney:

> "IF A SUBJECT REFUSES TO DISCUSS THE MATTER UNDER INVESTIGATION, CONCEDE HIM THE RIGHT TO REMAIN SILENT, AND THEN PROCEED TO POINT OUT THE INCRIMINATING SIGNIFICANCE OF HIS REFUSAL.
>
> "The most effective way to deal with a subject who refuses to discuss the matter under investigation is to concede to him the right to remain silent. This usually has a very undermining effect. First of all, his is disappointed in his expectation of an unfavorable reaction on the part of the interrogator. Secondly, a concession of this right to remain silent impresses the subject with the apparent fairness of his interrogator.
>
> "After this psychological conditioning, the interrogator should then proceed to point out to the subject the incriminating significance of his refusal to talk. The following comments have been found to be very effective: 'Joe, you have a right to remain silent. That's your privilege and I'm the last person in the world who'll try to take it away from you. If that's the way you want to leave this, O. K. But let me ask you this.

Suppose you were in my shoes and I were in yours and you called me in to ask me about this and I told you, "I don't want to answer any of your questions." You'd think I had something to hide, and you'd probably be right in thinking that. That's exactly what I'll have to think about you and so will everybody else. So let's sit here and talk this whole thing over.'

"After the subject has been talked to in this manner, the interrogator should then immediately ask the subject some innocuous questions that have no bearing whatsoever on the matter under investigation. For instance, the interrogator may inquire of the subject, 'How long have you lived in this city?'; 'Where are you working?'; 'How long have you worked there?'. As a rule the subject will answer such questions, and then gradually the examiner may start in with questions pertaining to the offense under investigation. Except for the career criminal, there are very few persons who will persist in their initial refusal to talk after the interrogator has handled the situation in this suggested manner.

"If a subject expresses a desire to talk to a relative, or to an employer, or to any other person, the interrogator should respond by suggesting that the subject first tell the truth to the interrogator himself rather than get anyone else involved in the matter. If the request is for an attorney, the interrogator may suggest that the subject save himself or his family the expense of any such professional service, particularly if he is innocent of the offense under investigation. The interrogator may also add, 'Joe, I'm only looking for the truth, and if you're telling the truth, that's it. You can handle this by yourself.' "

Is there any doubt that a statement produced under such circumstances results from undermining the "subject's" right "to remain silent unless he chooses to speak

in the unfettered exercise of his own will"! *Malloy v. Hogan, supra,* at 8.

Can it be seriously asserted that the extracting of confessions under such circumstances conforms to our accusatorial system under which "society carries the burden of proving its charge against the accused not out of his own mouth . . . [and] must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation." *Watts v. Indiana,* 338 U. S. 49, 54 (1949) (opinion of Frankfurter, J.). Where there has been a confession elicited through misapprehension, fear, trick or stratagem has there not been a violation of the basis of our system that "[t]he law will not suffer a prisoner to be made the deluded instrument of his own conviction." 2 Hawkins, Pleas of the Crown, c. 64 § 34 (8th ed. 1924). Indeed, such police interrogation has been aptly characterized as the worst of both worlds: "It is the inquisitorial system without its safeguards." *Watts v. Indiana, supra,* at 55 (opinion of Frankfurter, J.).

The absurdity of calling a confession "voluntary" when produced by typical police custodial interrogation designed to elicit a confession has been pointed up by an apt example in Professor Sutherland's recent article, Crime and Confession, 79 HARV. L. REV. 21, 37 (1965):

> "Suppose a well-to-do testatrix says she intends to will her property to Elizabeth. John and James want her to bequeath it to them instead. They capture the testatrix, put her in a carefully designed room, out of touch with everyone but themselves and their convenient 'witnesses', keep her secluded there for hours while they make insistent demands, weary her with contradictions and finally induce her to execute the will in their favor. Assume that John and James are deeply and correctly convinced that Elizabeth is unworthy and will make base use of the property if she gets her hands on it, whereas John and James have

the noblest and most righteous intentions. Would any judge of probate accept the will so procured as the 'voluntary' act of the testatrix?"

E. *Escobedo* Was Not Revolutionary, But Rather the Natural Culmination of a Series of Cases.

It was within this context of police custodial interrogation aimed at eliciting a confession that the Court in *Escobedo* held that denying Escobedo the presence of counsel during the interrogation resulted in the confession being obtained in violation of his right not to be compelled to incriminate himself. Despite the furor raised in some corners about the revolutionary nature of this decision, it is submitted that the decision was not revolutionary, but rather the natural culmination of a series of cases.

As noted above, beginning with *Lisenba v. California,* 314 U. S. 219 (1941), there was started a shift to the testing of State confessions by Fifth Amendment standards. This development culminated, in one of its phases, in the holding of *Malloy* that the Fifth Amendment right not to be compelled to incriminate oneself was applicable in toto to the States through the Fourteenth Amendment.

Alongside this development was the recognition by the Court in numerous "involuntary" confession cases that the fact that a suspect was held incommunicado, and, in particular, that he was not given access to an attorney during the interrogation period was highly significant in the determination of whether or not a confession was "voluntary." See, e.g., *Chambers v. Florida,* 309 U. S. 227 (1940); *Ashcraft v. Tennessee,* 322 U. S. 143 (1944); *Haley v. Ohio,* 332 U. S. 596 (1948); *Fikes v. Alabama,* 352 U. S. 191 (1957); *Spano v. New York,* 360 U. S. 315 (1959); *Culombe v. Connecticut,* 367 U. S. 568 (1961); *Gallegos v. Colorado,* 370 U. S. 49 (1962); *Haynes v. Washington,* 373 U. S. 503 (1963).

In this last case—which has been described by the Court as one in which there was "held inadmissible even a confession secured by so mild a whip as the refusal, under

certain circumstances, to allow a suspect to call his wife until he confessed," *Malloy v. Hogan, supra,* at 7 (1964)—the Court relied heavily upon the facts that Haynes was held incommunicado, at no time was warned of his right to remain silent or that his answers might be used against him nor told of his rights respecting consultation with an attorney. The step from *Haynes* to *Escobedo* is an extremely short one, if, indeed, one at all. If *Haynes* represents the capstone of the "involuntary" confession cases, then *Escobedo* represents the application of this capstone in light of the full Fifth Amendment protection held to be applicable to State interrogation by *Malloy.*

F. The Inherently Compelling Nature of Police Custodial Interrogation Requires That a Confession Obtained During Such Interrogation Be Excluded Unless the State Shows That There Were Present Adequate Devices to Protect the Subject's Privilege Against Self-Incrimination.

As the above analysis shows, usual police custodial interrogation designed to elicit a confession is inherently violative of the subject's right not to be compelled to incriminate himself. It is obviously impossible to probe the mind of the subject of this interrogation to determine whether in fact these compelling circumstances were the causative force behind his making the self-incriminating statements. Recognizing this fact, this Court has never adopted such a self-defeating inquiry but has tested the issue of compulsion as against the possibility of compulsion inherent in the external situation. *Cf. Ashcraft v. Tennessee,* 322 U. S. 143, 154 (1944). When the external police created situation is such to be inherently prejudicial to the subject's privilege against self-incrimination, a Court does not, and can not "stop to determine whether prejudice resulted." *Hamilton v. Alabama,* 368 U. S. 52, 55 (1961).[6]

6. On this point, the same result should be reached on a Sixth Amendment approach as there the issue is also one of possible, not actual prejudice. See *Hamilton v. Alabama,* 368 U. S. 52 (1961).

It is particularly apt that the focus of a self-incrimination issue be on the external conditions established by government. As this Court has recognized, a major basis for the privilege was our rejection of the inquisitorial *system*, the Star-Chamber *process*. See, e.g. *Murphy v. Waterfront Commission*, 378 U. S. 52, 55 (1964). Thus, concentration on the *system* or *process* of police interrogation is not only appropriate but necessary if we are to maintain fidelity to one of the major purposes of the privilege.

It is within this concept of analyzing the police process that we have reviewed the process of police custodial interrogation designed to elicit a confession and shown that this process is typically violative of the subject's privilege against self-incrimination.

G. Under the Present Circumstances of Police Custodial Interrogation Designed to Elicit a Confession, the Presence of Counsel Is Required to Protect the Subject's Privilege Against Self-Incrimination.

The issue now is what protective devices need be added to this police custodial interrogation to make the process conform to Fifth Amendment requirements, i.e., to dispel the government established compelling atmosphere. *Escobedo*, consistent with previous precedent, held that, under the present conditions of police custodial interrogation, the presence of counsel was this necessary protective device. The protection of the Fifth Amendment privilege afforded by the presence of counsel in police custodial interrogation designed to elicit a confession has been spelled out in the other briefs in this case, is well known to this Court, and therefore, can be here quickly summarized. These include giving an effective warning of the suspect's privilege "to remain silent unless he chooses to speak in the unfettered exercise of his will"; providing someone in whom the subject can confide and who is a contact between the subject and the outside world; assuring that if the subject chooses

to tell his story, he does so in a way that conveys his intended meaning; and providing an outside observer to the interrogation proceedings.

Obviously an effective warning of the privilege is a keystone of its effective enforcement. It is equally clear that there is a need to provide the presence of someone at interrogation in whom the subject can confide and who will bolster his confidence. As discussed above, it is a prime function of police custodial incommunicado interrogation to tear a subject away from all things in which he can rely for support and place him in complete subservience to the interrogator. The aim is to have him dominated by the interrogator. In order to dispel such circumstances, therefore, it is manifestly necessary that the incommunicado environment be eliminated. The presence of counsel will tend to accomplish this aim. Not only is counsel a person outside the police force, he is one who can meet the accomplished police interrogator on a level of at least partial equality. By training and experience he should not be afraid to stand up to unrestrained governmental power. He is someone in whom the subject can freely confide. It is his job to be a whole-hearted advocate for the subject with no conflicting interests in this regard.

In order to make effective the privilege against self-incrimination it is also necessary to ensure that if a person desires to tell his story he is allowed to do so in a way that conveys his intended meaning. A police interrogator, however, is basically an accomplished cross-examiner who is trained to allude to a particular piece of incriminating evidence but then to "be on guard to shut off immediately any explanation the subject may start to offer at that time." Inbau & Reid, p. 27. Counsel present will tend to ensure that the accused has a real opportunity, if he so desires, to tell his story effectively and to eliminate distortions and ambiguities. In short, counsel can aid in examining the accused so that his story comes out as he aims to tell it as well as protecting him from unrestrained cross-examination. This Court has recognized the need

for "the guiding hand of" counsel to so aid an accused at trial where "[t]he tensions . . . for an accused with life or liberty at stake might alone render him utterly unfit to give his explanation properly and completely." *Ferguson v. Georgia,* 365 U. S. 570, 594 (1961). The Court in *Ferguson* recognized that "when the average defendant is placed in the witness chair and told . . . that nobody can ask him any questions, and that he may make such statement to the jury as he sees proper in his own defense, he has been set adrift in an uncharted sea with nothing to guide him . . . ." *Id.* at 593. The accused may be "overwhelmed by his situation, and embarrassed . . . and . . . it will not be surprising if his explanation is incoherent, or if it overlooks important circumstances." *Id.* at 595-596. These statements were made in the context of a trial in which the accused had spoken with counsel before taking the stand, and his counsel and friends were present throughout. Moreover, the prosecutor could not cross-examine. Can there be any doubt that they are even more relevant where the accused is held incommunicado and at the same time subjected to intense, unrestrained cross-examination? *Cf. Pointer v. Texas,* 380 U. S. 400 (1965).

Finally, if counsel is present at the interrogation, he can ensure that there will be a record of the entire proceedings, so as to preserve the context in which any statement is made. He can make certain that there is no "off the record" pressure exerted on his client. Too often a court determination of the admissibility of a confession turns on whether the court believes the police or the accused in their often conflicting stories of what has occurred in that sound-proofed, windowless interrogation room. The presence of counsel will provide a witness to the interrogation process and counsel will, by his presence, deter any possibility that the police might, in their zeal to extract a confession, resort to practices intended to compel one.

This summary of the need for the presence of counsel during custodial police interrogation designed to elicit a

confession leads to a clear resolution of a number of "*Escobedo* questions" now being presented to the Court.

1. *A Police Warning of the Right to Remain Silent Is Not Adequate to Protect the Subject's Privilege Against Self-Incrimination.*

It is clear that a police warning cannot even be argued to serve any of the above-stated necessary protective functions other than the giving of the warning itself. It is submitted, however, that it does not adequately serve even this limited function.

As has been stated:

> "The Constitution does not contemplate that prisoners shall be dependent upon government agents for legal counsel and aid, however conscientious and able those agents may be. Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer." *Von Moltke v. Gillies*, 332 U. S. 708, 725-26 (1948) (opinion of Black, J.).

Professor Kamisar has recently written:

> "(W)hen we expect the police dutifully to note a suspect of the very means he may utilize to frustrate them—when we rely on them to advise a suspect unbegrudingly and unequivocally of the very rights he is being counted on *not* to assert—we demand too much of even our best officers. As Dean Edward L. Barrett has asked '*(I)s it the duty of the police to persuade the subject to talk or persuade him not to talk? They cannot be expected to do both.*'" Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time, Magna Carta Essays (Howard, ed. 1965). (Emphasis added.)

It seems hard to state a more effective answer to a claim that a police warning is adequate than that given in the Amicus Brief of the National District Attorneys'

Association: At best the police warning "will benefit only the recidivist and the professional. *The first offender and the Culombes, Fikeses, Malloys, Haynes or Recks will not be the beneficiaries.*" P. 14. (Emphasis added.)

Moreover, this same brief makes the point that in imposing a duty resting solely on the police, with no objective verification of its exercise, there is a likelihood that the police will "stretch the truth" as to the fulfillment of this duty. The brief quotes the following passage from DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND, 47 (1960) concerning experience in England with the Judges' Rules:

> "The Rules undoubtedly required the observance of a very high standard, and it may be a higher standard than the average policeman was in the first instant naturally inclined to adopt. It is difficult to say what extent the spirit of the Rules is infringed because, as I have said, *it is the general habit of the police never to admit to the slightest departure from correctness.*" (Emphasis added by the N. D. A. A. Brief to the original.)

Indeed, in light of such contemplated police action and the sophisticated interrogation techniques used by the police, it is not impossible to conceive the use of a formal warning as a direct means of intimidation and compelling the subject to confess.

Even if, however, a perfunctory warning of the right to remain silent given by the police prior to interrogation might be an effective protective device for a time thereafter, its effectiveness would soon wear off when confronted by the plethora of police stratagems and techniques designed precisely to loosen the subject's tongue.

The Court in *Ecobedo* quite clearly recognized this fact when it found that even a prior warning of the right to remain silent given to Escobedo by his attorney was not effective in dispelling the compelling circumstances presented by new police stratagems. Despite these prior

warnings, Escobedo was compelled to incriminate himself when presented with the classic interrogation technique of an accomplice's accusation—a technique clearly designed to overcome the subject's desire not to speak. How much more easily could the effect of a police warning be overcome by such techniques.

2. *Prior Access to Counsel, as Distinguished From the Presence of Counsel, Is Not Adequate to Protect the Subject's Privilege Against Self-Incrimination.*

The above-stated facts of *Escobedo* indicate also that prior access to counsel rather than the presence of counsel at interrogation is not sufficient to protect the subject's Fifth Amendment right not to be compelled to incriminate himself; the effectuation of that right necessitated that Escobedo have counsel present when he was confronted with the new police stratagem of the accomplice's accusation. As the Court stated: "The 'guiding hand of counsel' was essential to advise petitioner of his rights in this delicate situation." 378 U. S., at 486. In addition, of course, again prior access to counsel does not even arguably provide the other necessary protective devices.

3. *Neither the Existence of Retained Counsel nor a Request to See Him Are Required by the Proper Application of Escobedo.*

It is true that in *Escobedo,* the subject of custodial police interrogation had retained counsel and requested to see him. The relevance of these facts, however, depends upon the proper analysis of the rights protected by that decision; the analysis contained in this brief clearly shows that they are not at all significant. The issue always remains a determination of what is necessary to dispel the compelling atmosphere of the interrogation. It is true that when Escobedo asked for and was denied the right

to consult his attorney this clearly reinforced the compelling nature of the interrogation. The refusal told him in no uncertain terms that the police were in charge, that they were determined to get him to confess and that they would not let him see his attorney until they chose to do so—after he confessed. *Cf. Haynes v. Washington,* 373 U. S. 503 (1963).

Yet, as the above discussion has shown, even absent this aggravating element of *Escobedo,* such interrogation was inherently compelling and only the presence of counsel could dispel that atmosphere. Indeed, it might be argued that Escobedo's expressed request to consult with counsel indicated that the usual compelling nature of the interrogation would not work as effectively on him as on others. Escobedo obviously had a sense that he had some rights and was not completely subject to the will of the interrogator. A requirement that there must be a request would only result in placing the ignorant and inexperienced —those who most need the services of an attorney to dispel the compelling nature of the interrogation—at a distinct disadvantage in the enforcement of their constitutional rights. "The defendant who does not ask for counsel is the very defendant who most needs counsel; we cannot penalize a defendant, who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status had fortuitously prompted him to make it." *People v. Dorado,* 42 Cal. Rep. 169, 177-178, 398 P. 2d 361, 369-371, *cert. denied* 381 U. S. 946 (1965).

The same analysis leads clearly to the result that it is irrelevant that a subject of police custodial interrogation cannot afford retained counsel. It cannot seriously be maintained that an indigent subject's Fifth Amendment rights are less deserving than those of an affluent one. Since the presence of counsel is as necessary to effectuate

an indigent subject's Fifth Amendment right as those of a more affluent interrogation subject, counsel must be equally available to both.

As Professor Kamisar, *supra,* at 71-73 has written:

> "If, as the *Escobedo* Court tells us, our Constitution strikes the balance between the importance of an 'interrogation opportunity' to the police and the criticalness of that stage to the accused 'in favor of his privilege against self-incrimination' how can those . . . [too poor to retain counsel] be denied the benefits of this policy resolution? If 'the guiding hand of counsel' at the police interrogation stage is 'essential to advise [a suspect] of his rights in this delicate situation,' how does the situation become less delicate, less perilous; why does the need for legal guidance diminish, when the suspect is poor or ignorant?
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> • • •
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> "To say that the aforementioned alleged classifying traits do not bear a reasonable relation to the policies and purposes of *Escobedo* is not the worst that can be said for them. It may also be said that, at least insofar as the criminal process is concerned, most, if not all, of these traits cannot be the basis for constitutional classification; they are irrelevant per se. If 'the mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color' —then the inability of a suspect to retain counsel cannot constitute sufficient grounds for limiting the impact of *Escobedo* . . ."

In the words of the *Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice,* p. 9 (1963):

> "It should be understood that governmental obligation to deal effectively with problems of poverty in the

> administration of criminal justice does not rest or depend upon some hypothetical obligation of government to indulge in acts of public charity. It does not presuppose a general commitment on the part of the federal government to relieve impoverished persons of the consequences of limited means, whenever or however manifested. It does not even presuppose that government is always required to take into account the means of the citizen when dealing directly with its citizens . . .
>
> "The obligation of government in the criminal cases rests on wholly different considerations and reflects principles of much more limited application. The essential point is that the problems of poverty with which this Report is concerned arise in a process initiated by government for the achievement of basic government purposes. It is, moreover, a process that has as one of its consequences the imposition of severe disabilities on the persons proceeded against. Duties arise from action. When a course of conduct, however legitimate, entails the possibility of serious injury to persons, a duty on the actor to avoid the reasonably avoidable injuries is ordinarily recognized. When government chooses to exert its powers in the criminal area, its obligation is surely no less than that of taking reasonable measures to eliminate those factors that are irrelevent to just administration of the law but which, nevertheless, may occasionally affect determinations of the accused's liability or penalty. While government may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its administration of justice."

The decisions of this Court support the statements of Professor Kamisar and the Attorney General's Committee. See *Gideon v. Wainwright*, 372 U. S. 335 (1963); *Douglas*

v. California, 372 U. S. 353 (1963); *Lane v. Brown*, 372 U. S. 477 (1963); *Draper v. Washington*, 372 U. S. 487 (1963); *Griffin v. Illinois*, 351 U. S. 12 (1956). Indeed, *Douglas v. California, supra*, seems directly on point for the issue here presented. In that case, the Court held that where an appeal is provided to all those convicted of crime, an indigent is entitled to an attorney on such appeal since the assistance of an attorney is required to effectuate this right to appeal. As we have thus analyzed *Escobedo* the parallel is obvious. There the Fifth Amendment privilege against self-incrimination is constitutionally provided to all persons. Failure to provide the assistance of counsel during police custodial interrogation designed to elicit a confession renders this right illusory in such context. Can there then be any question, under *Douglas*, that the merger of the Fifth Amendment and Equal Protection Clauses requires the appointment of counsel for an indigent?

II.

Application of the Rule in Contexts Other Than the Usual Police Custodial Interrogations Designed to Elicit a Confession.

This discussion of the meaning and application of *Escobedo* has been concerned solely with custodial police interrogation designed to elicit a confession. This is the context in which all the cases now presented to the Court arise and on the basis above set forth it is urged that the Court hold that the confessions were inadmissible in these cases.

We will not attempt to apply the analysis in this brief to all possible hypothetical cases of police interrogation not consisting of in-custody interrogation designed to elicit a confession. It is submitted that these other situations must be decided as they arise with full consideration given to the factual variants presented. *Cf. Haynes v. Washington*, 373 U. S. 503 (1963).

Where, for example, questioning is of a general investigatory type, where it is conducted in the questionee's home with family and friends present, or where there are other possible factual patterns, it may not be necessary to have counsel present in order to protect the questionee's right not to be compelled to incriminate himself. Again, the situation is far different from that analyzed in this brief, where a person volunteers a statement without any prior police questioning or pressure. While, therefore, there is no litmus paper test to solve all questions in this area, it is submitted that the basic principle remains constant. That principle is measuring the government-founded circumstances surrounding the confession against the Constitutional requirement that these circumstances not be such as to be conducive to a violation of the questionee's right not to be compelled to incriminate himself—his right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy v. Hogan,* 378 U. S. 1, 8 (1964).

It must also be remembered that neither in *Escobedo* nor in any of the cases now presented to this Court has there been any evidence that what was conducted was not usual police interrogation designed to elicit a confession. In none of these cases has there been any evidence that there were operative, either by legislative determination or police practice, protective devices other than the presence of counsel that might even arguably be effective in dispelling the inherently compelling nature of this type of interrogation.

Although your Amicus feels that the chances are unlikely it is, of course, possible that protective devices other than the presence of counsel may be devised and become operative which are effective to protect the Fifth Amendment right in police custodial interrogation and thereby remove the need for the presence of counsel for this purpose. If such new devices are proposed and become operative, of course, it would be the duty of the courts to deter-

mine whether or not they meet the need. A holding that under the available devices of today, the presence of counsel is necessary to protect the Fifth Amendment right should not foreclose a determination that other available protective devices are equally acceptable when and if such devices are formulated.

As stated above, however, neither in *Escobedo,* nor in any of the cases now before this Court, have any of the government parties argued the availability or advisability of other protective devices. Indeed, the government arguments in the present cases are that not even the clearly inadequate devices of a police warning or prior access to counsel should be provided in an attempt to dispel the compelling nature of police custodial interrogation designed to elicit a confession. What is desired is the unrestrained existence of this compelling situation.

III.

The Argument That Police "Need" the Existence of the Compelling Nature of Custodial Interrogation Must and Should Be Rejected.

It is argued to this Court that restrictions on the powers of the police freely to interrogate suspects as here advocated will prevent effective police work and thus contribute to what is asserted to be a mounting crime rate and that, therefore, the balance in this area must and should be struck, not on the side of the protection of individual liberties, but on the side of this asserted police need.

A. Even if Such "Need" Were Shown the Constitution Requires That the Balance Be Struck on the Side of Effective Enforcement of the Fifth Amendment.

It is submitted that even if these claims of police need were substantiated, the Constitution requires that the bal-

ance here be struck on the side of effectively enforcing an accused's Fifth Amendment right not to be compelled to incriminate himself.

As the Court stated in *Escobedo,* 378 U. S., at 488-490:

> "Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination. . . .
>
> "We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation. . . .
>
> "We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system." (Emphasis in the original.)

B. However, It Is Not Necessary for This Court to Face the Ultimate Balancing as the Asserted Police "Need" Has Not Been Shown to Exist.

This ultimate balancing issue, however, need not be reached as the case for the asserted police "need" has not been made out. For an analysis of the available data, see Kamisar, On the Tactics of Police-Prosecution Oriented Critics on the Courts, 49 Cornell L. Q. 436 (1964).

The first point in the police-necessity thesis is the postulate that there is a clear link between court decisions protecting the rights of the accused and an alleged upward advance in the rate of criminal behavior. Even if it is assumed that there has been a rise in criminal behavior in the last few years, an issue not at all free from doubt, see Kamisar, *supra,* 49 Cornell L. Q., at 462, it is clear that there has been no showing of a link between such a rise and court decisions securing individual liberties.

Certainly no statistical data has been produced to show such a link. See Kamisar, *supra,* 49 Cornell L. Q., at 458-471. While admitting this lack of statistical data, Professor Inbau, a leading spokesman for police necessity, has argued that "simple logic" supports the existence of such a link. Inbau, *More About Public Safety v. Individual Civil Liberties,* J. CRIM. L. C. & P. S., 329, 331 (1962). Professor Inbau has recently stated that "since most crimes are solveable only by this interrogation opportunity, whenever you get the courts restricting that interrogation opportunity, you are going to solve fewer crimes and you are going to catch fewer criminals. Furthermore, the incentive to commit crime as well as the actual amount of crime is going to increase." *A Forum on the Interrogation of the Accused,* 49 Cornell L. Q. 382, 387-388 (1964).

Assuming *arguendo,* that interrogation opportunity is necessary to solve crimes and convict criminals, is it clearly a matter of "simple logic" that there is a causal connection between restricting this opportunity and an increased incidence of criminal behavior? It hardly needs to be stated that the roots of crime are planted in a number of complex social factors such as: discrimination, environment, drug addiction and unemployment, as well as individual psychological and psychiatric variants. We are only now beginning to gain the necessary knowledge in order to cope with and treat causes rather than symptoms. It is

just too simplistic a form of logic to ascribe criminal behavior to court decisions.

Indeed, it may well be argued that "simple logic" indicates that there is a causal link between unrestrained police conduct and a high incidence of criminal behavior.

As Mr. Justice Brandeis has so eloquently written:

> "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means —to declare that the Government may commit crimes in order to secure the conviction of a private criminal— would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." *Olmstead v. United States,* 277 U. S. 438, 485 (1928) (dissenting opinion), quoted with approval by the Court in *Elkins v. United States,* 364 U. S. 206, 223 (1960) and *Mapp v. Ohio,* 367 U. S. 643, 649 (1961).

Recently, Judge Bazelon has amplified this thought:

> "We should be aware that if the protections of the Bill of Rights are restricted we shall, in practice, be affecting directly the rights of only our more deprived population. When we talk about arrests for investigation, lengthy police interrogation prior to arraignment, and the like, the subject under discussion is not you or I. We don't get arrested without probable cause because, to put it plainly, we don't 'look' as if we would commit acts of violence and we do look as if it might not pay to trifle with our rights. Nor would you or I be subjected to long interrogation by the

police without the benefit of counsel. Nor do you and I live in neighborhoods where the police dragnet is used, and where suspects are subjected to wholesale arrest. "So the issue really comes down to whether we should further whittle away the protections of the very people who most need them—the people who are too ignorant, too poor, too ill-educated to defend themselves. Can we expect to induce a spirit of respect for the law in the people who constitute our crime problem by treating them as beyond the pale of the Constitution?" Bazelon, *Law, Morality & Civil Liberties,* 12 UCLA L. REV. 13, 27-28 (1964).

This is not to say that any "simple logic" shows that there is a causal link between lack of restraints on the police and an increased incidence of criminal behavior. It is to say that the converse "simple logic" is not self-evident and that in this area of complicated sociological and psychological factors there are no "simple logic" answers.

In particularizing the police necessity argument in the area of unrestrained police interrogation, its proponents argue that restraints on police interrogation such as here advocated will result in the elimination of the obtaining of confessions, see *Escobedo,* 378 U. S., at 488, and that the resulting unavailability of confessions will drastically reduce the possibility of obtaining convictions of the guilty. See e.g., N. Y. TIMES, Dec. 2, 1965, p. 1, col. 2; *id.*, May 14, 1965, p. 39, col. 1.

It does not seem, however, that either "simple logic" or available statistical data supports these assertions. Even if it is assumed that the current practice of most prosecutors is not to interrogate suspects when counsel is present, see Note, 73 YALE L. J. 1000, 1049, 268:

> "[T]he fact that most prosecutors do not now interrogate a man once he has obtained counsel does not mean that they would find interrogation with counsel

useless. Nor does the present practice of criminal lawyers of advising his client to keep silent during interrogation mean that he would invariably advise silence if he were permitted to be present and to have some control over the process. The attorney has not, contrary to generally accepted notions, seen his role as constant impediment to the criminal process, making it as hard for the state as possible. In many cases full disclosure is exchanged for a lesser charge. In fact, more guilty pleas are obtained from counseled defendants than from non-counseled ones. Furthermore, an attorney may find the flow of information helpful. Counsel now does not invariably advise his client not to take the stand at trial. Similarly, at interrogation, participating counsel may find out what the District Attorney really knows about the case." *Id.*, at 1049.

Indeed, not all prosecutors urge that they or the police need the power of secret interrogation; witness the remarks of District Attorney Aaron E. Koota, N. Y. TIMES, Nov. 22, 1964, p. 35, col. 1, under whose jurisdiction the ill-fated and much publicized "confession" of George Whitmore, Jr. was elicited. See also Sutherland, *Crime and Confession,* 79 HARV. L. REV. 21, 37-39 (1965).

More significantly, there is no substantiation for the claim that confessions are necessary to the conviction of the guilty. Attempts to obtain confessions may be used as "easier" substitutes for proper, independent police investigatorial processes. Moreover, confessions are sometimes sought even when ample other evidence is already in hand. Police have attempted to elicit confessions when the crime has been committed in front of a dozen witnesses, indeed when it has been committed in the presence of the police themselves. For example, there could scarcely have been less need for a confession than was present in the circumstances of *People v. Dorado,* 42 Cal. Rptr. 169, 398 P. 2d 361 (1965), *cert. denied,* 381 U. S. 946 (1965). See

also Sobel, The Exclusionary Rules in the Law of Confessions, A Legal Perspective—A Practical Perspective, Part Six, N. Y. Law J., Nov. 22, 1965, p. 1, col. 4.

As the Court stated in *Haynes v. Washington*, 373 U. S. 503, 519 (1963):

> "This case illustrates a particular facet of police utilization of improper methods. While history amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence, the coercive devices used here were designed to obtain admissions which would incontrovertibly complete a case in which there had already been obtained, by proper investigative efforts, competent evidence sufficient to sustain a conviction. The procedures here are no less constitutionally impermissible, and perhaps more unwarranted because so unnecessary. There is no reasonable or rational basis for claiming that the oppressive and unfair methods utilized were in any way essential to the detection or solution of the crime or to the protection of the public. The claim, so often made in the context of coerced confession cases, that the devices employed by the authorities were requisite to solution of the crime and succession prosecution of the guilty party cannot here be made."

It should also be noted that India and Scotland have strict rules excluding from evidence confessions obtained as a result of police interrogation and such rules do not seem to have marked effects on law enforcement in those countries. See, Note, 73 Yale L. J. 1000, 1045-1046 (1964). Nor has any substantial adverse effect of law enforcement been shown in the federal and state jurisdictions that operate under the *McNabb-Mallory* rule or an equivalent. *Id.*, at 1046.

While these facts by no means prove that the eliciting of confessions is not essential to the solution of crime and the conviction of the guilty, they do cast substantial doubt

on the unsupported assertions of police and prosecutors of the essentiality of confessions.

In summation on this point, it seems quite evident that while not clearly refuting the claim, neither simple logic nor the available statistical evidence supports the argument that opportunities for secret, unrestrained and unhampered police and prosecutorial interrogation are essential to controlling or reducing the incidence of criminal behavior.

If there is more data in this area that should or can be produced, the burden of production clearly rests on government and not on an individual accused. An individual accused has neither the motivation nor resources to produce data relevant to a determination of the "need" for allowing the unrestrained police interrogation desired by those who assert the existence of such a need. On the other hand, government has both the continuing interest and the resources to produce such data if, in fact, it can be done. Thus far, nothing has been produced that could by any stretch be deemed to justify overriding a suspect's constitutional rights because of overwhelming societal necessity.

Not only has government not produced any such data in litigation contexts, there have not even been governmental legislative determinations of such need. It is significant that in none of the "involuntary" confession cases, nor in *Massiah, Escobedo* nor the cases here presented has the police interrogation been pursuant to a legislative determination that such interrogation is necessary or proper. Indeed, to the extent that there have been legislative determinations, they have been that such interrogation is neither necessary nor proper. Rule 5(a) of the Federal Rules of Criminal Procedure requires federal officers to take arrested persons before a commissioner "without unnecessary delay." Thirty-six states have similar procedures using either such general times as "without necessary delay" or specific time limits. For a collection of the statutes, see, *LaFave, Detention for Investigation by the*

Police: An Analysis of Current Practices, 1623 WASH. U. L. Q. 331, 332-333. And, in some states, a suspect has a statutory "right" not to be held incommunicado. For a collection of the statutes see *Crooker v. California,* 357 U. S. 433, 448 n. 4 (1958) (dissenting opinion). See also *Lisenba v. California,* 314 U. S. 219 (1941); *Ashcraft v. Utah,* 357 U. S. 427 (1947); *Escobedo v. Illinois,* 378 U. S. 478 (1964).

It seems clear that in a scale composed of the unsupported necessity assertions of police and prosecutors on one side and the effectuation and protection of a person's constitutional right not to be compelled to incriminate himself on the other, the balance must be struck on the side of the Constitutional right.

Respectfully submitted,

ANTHONY G. AMSTERDAM,
PAUL J. MISHKIN,
Attorneys for Amicus Curiae.

Of Counsel:

RAYMOND J. BRADLEY,
H. ROBERT FIEBACH,
PETER HEARN,
MELVIN L. WULF.

Appendix.

O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (1959)

Chapter 9

Interrogations

1. Terms

For the purpose of simplifying the treatment of interrogations a special meaning will be attached to some of the terms used. It should be understood that these conventions are not universally accepted.

a. *Interrogations.* An interrogation is a questioning of a person suspected of having committed an offense or of a person who is reluctant to make a full disclosure of information in his possession which is pertinent to the investigation.

b. *Witness.* A witness is a person, other than a suspect, who is requested to give information concerning an incident or person. He may be a victim, a complainant, an accuser, a source of information, an observer of an occurrence, a scientific specialist who has examined physical evidence or a custodian of official documents. A witness is usually interviewed, but he may be interrogated when he is suspected of lying or of withholding pertinent information.

c. *Suspect.* A suspect in an offense is a person whose guilt is considered on reasonable grounds to be a practical possibility.

d. *Subject.* The term subject will be used here most commonly to represent the person, whether witness or sus-

pect, who is being interviewed or interrogated. The subject in this sense is not necessarily the subject of the case under investigation. Where the term is used to refer to the subject of the case, the distinction will be apparent from the phrasing and context. A subject is ordinarily interrogated for one of the following purposes:

1) To obtain a confession to the crime.

2) To induce the subject to make admissions.

3) To learn the facts and circumstances surrounding a crime.

4) To learn the identity of accomplices.

5) To develop information which will lead to the recovery of the fruits of the crime.

6) To discover the details of any other crimes in which the suspect participated.

2. The Interrogator

The interrogator must be able to dominate his subject, not through use of his formal authority but because his personality commands respect. He must be professional in attitude and performance. If he reveals any wavering tendencies the suspect may discover the means of resisting the interrogation. To inspire full confidence, the force of the investigator's personality should be tempered by an understanding and sympathetic attitude. The subject must feel instinctively that he is talking man-to-man with a person who is interested in his viewpoint and problems. The suspect who has been forced to cooperate with hostile organizations will tell his story much more readily if he feels that the investigator understands his helplessness and is inclined to take his plight into consideration. The following qualifications and traits are desirable in an interrogator:

a. *General Knowledge and Interests.* To a large degree, the efficiency of an investigator is commensurate with

his general knowledge. To acquire this breadth of knowledge, the investigator must develop intellectual curiosity and a keen sense of observation. He must cultivate a genuine interest in people and their problems, for such knowledge will help him in determining motives as he deals with many types of personalities in a variety of circumstances. It is highly desirable that he have a wide range of knowledge concerning professional and technical matters, since his subjects represent nearly every phase of human activity. The background and personality of these individuals, together with the information they provide, can be assessed adequately only if the interrogator is prepared to discuss their major interests intelligently and to analyze their motives in light of environmental factors.

b. *Alertness.* The variety of problems confronting him requires the interrogator to be constantly alert so he can analyze his subject accurately, adapt his technique to the requirements of the case, uncover and exploit leads, and alter his tactics when necessary. A sense of logic will not in itself quickly reveal contradictions in a subject's story; it must be accompanied by a quick awareness of the contradictory information. Discovery of gaps in the subject's story after the interrogation is less satisfactory than on-the-spot recognition, because the time interval gives the subject opportunity to reflect upon the matter before questioning is renewed.

c. *Perseverance.* Every interrogation requires a great deal of patience if complete and accurate information is to be obtained. The need for patience is obvious when lack of cooperation is encountered; but perseverance frequently is required even when the suspect is willing to help but is unable to recall precisely the complex ramifications of his story or to explain discrepancies.

d. *Integrity.* If the individual being questioned has reason to doubt the integrity of the interrogator, it is practically impossible for the latter to inspire confidence or

trust. The interrogator must never make a promise he cannot keep; he should keep all promises he makes.

e. *Logical Mind.* The interrogator must develop the questioning along a logical line. The objectives of the questioning should be clearly defined in his own mind. A plan of questioning should be built around the requirements of establishing the elements of proof of the offense.

f. *Ability in Observation and Interpretations.* He must not only develop the ability to "size up" an individual, but also must learn to observe and interpret his reaction to questions.

g. *Power of Self-Control.* He must maintain control of himself at all times. Loss of temper results in a neglect of important details.

h. *Playing the Part.* It is quite justifiable during questioning, if it will accomplish the desired results, for the investigator to act as though he were angry or sympathetic to suit the needs of the situation.

2. Conduct of the Interrogator

The behavior of the interrogator at the outset of the questioning usually establishes the atmosphere that will prevail throughout the interrogation. It is of great importance for the investigator to develop an effective personality that will induce desire to respond in the subject. Personal mannerisms must be controlled wherever they distract or antagonize. The following are some of the more useful reminders concerning attitude and demeanor:

a. *Dominate the Interview.* The interrogator must always be in command of the situation. The strength of his personality must constantly be felt by the subject. He must never lose control through indignation, ill temper, hesitancy in the face of violent reactions, or obvious fumbling for questions as a result of a lack of resourcefulness.

b. *Distracting Mannerisms.* The subject must be impressed with the seriousness of the interrogator's purpose. Pacing the room, smoking, "doodling," and similar forms of behavior should be avoided, since they tend to convey a sense of inattentiveness or a lack of concentration. The investigator should seat himself close to the subject with no intervening furniture and focus his attention on the subject. The full weight of his personality must be brought to bear on the emotional situation. Distance or obstructions provide the subject with a small degree of confidence and relief.

c. *Language.* The speech of the interrogator should be adapted to the subject's cultural level. Profanity and vulgarity should be avoided, since they diminish the effectiveness of the interrogator by compromising his dignity or antagonizing the subject. The uneducated subject must be approached in his own language. Simple, forthright diction should be employed. It is especially important in sex cases to avoid ambiguities. Slang may be used if it provides ease of speech or fluency to the subject. The choice of words should be made with a view to encourage a free flow of speech in the subject. Where the subject may shy away from words such "assault" and "steal," he may not hesitate to admit that he "hit" or "took." It is a natural tendency for a person to describe his conduct in terms of euphemisms.

d. *Dress.* Civilian dress is more likely to inspire confidence and friendship in a criminal than a uniform. The accoutrements of the police profession should be removed from view. The sight of a protruding gun or billy may arouse an enmity or defensive attitude on the part of the criminal.

e. *Attitude.* The interrogator is not seeking to convict or punish. He is endeavoring to establish the facts of the case; to discover the truth; to clarify a misunderstanding; to help the criminal to straighten himself out; to clear up

this mess; to simplify matters; to rectify an unfortunate situation; to see what he can do to help the subject to help himself; to get rid of a distasteful task as painlessly as possible; to see that the subject's accomplices are not doing him an injury; and so forth. There is an endless series of locutions with which the investigator can attractively decorate his role in the administration of justice.

f. *Preliminary Conduct.* In military and certain other federal investigative agencies, it is required that the interrogator identify himself and show his credentials to the subject. He must then state, in general terms, the purpose of the interrogation. Before beginning the questioning, the must advise the suspect of his rights against self-incrimination and inform him that he does not need to answer the questions and that if he does answer, his answers can be used as evidence against him.

g. *Presence of Other Persons.* It is desirable to restrict the number of persons present at an interrogation. If a confession is obtained the defense may claim the existence of duress because of the presence of five or ten police officers. Moreover, some courts require the prosecution to produce all the witnesses of a confession. A parade of ten detectives to the witness stand creates an unfavorable impression and opens up the likelihood of inconsistencies of the testimony. Ordinarily the interrogator should be alone with the subject. Other parties may be brought in for a specific purpose, such as witnessing the signing of a confession.

3. Place

If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions

or criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law. The structure, the personnel, and all observable activities have but one purpose—the discovery of truth and the detection of crimes.

4. The Interrogation Room

The room chosen for the interrogation should provide freedom from distractions. Secondarily, it should not be designed to give encouragement to the suspect. The following ideal requirements are listed with these two principles as a basis:

a. *Privacy.* Interruptions dispel an amtosphere that may have been carefully created by the interrogator, hence, the following are desirable:

1) *One door.* Several doors suggest possible interruption and destroy the feeling of inevitability.

2) Absence of windows or view.

3) Sound-proofing.

4) Telephone without bell.

b. *Simplicity.* Distracting influences should be kept to a minimum. The suspect may strive to avoid the investigator's concentration by focusing his attention on some object in the room which suggests a different train of thought.

1) Medium sized room.

2) Bare walls. Pictures and charts are distracting.

3) No glaring lights.

4) Minimum furniture.

c. *Seating Arrangement.* The suject and the investigator should be seated with no large furniture between them.

1) *Chair.* Armless, straight-back chair for the suspect.

2) *Table or Desk.* The investigator requires a flat surface on which to place papers and articles of evidence.

3) *Suspect.* Seating the suspect with his back to the door further deprives him of any hope of interruptions or distraction.

d. *Technical Aids.* Although the investigator should be alone with the subject, it is desirable to have facilities for others to observe and hear the suspect during the interrogation. Other investigators may suspect the subject of participation in other crimes. Thus the interrogation room can also serve as a line-up or show-up room. In an important case the investigator will require the assistance of his associates. By their listening unobserved to the interrogation they may be able to make useful suggestions and draw more objective conclusions. Persons such as the prosecuting attorney will find this opportunity to observe the prospective defendant invaluable in preparing his case. Victims and complainants are enabled to make identifications.

1) *Recording Installation.* Important interrogations and confessions should be recorded.

2) *Listening Device.* A hidden microphone such as a "live" telephone should be installed.

3) *Two-Way Mirror.* This device appears to be a plain mirror on one side but permits a person on the other side to see through without being observed. Unfortunately the typical two-way mirror installation is obvious and is familiar to the experienced criminal. A more deceptive arrangement can be devised with a little ingenuity. A framed picture with a mirror strip border is less familiar.

A medicine chest with a mirror door will pass unnoticed if a small sink is installed beneath it.

5. Selection of Technique and Approach

In the work of an interrogation, the principle of economy of means should guide the investigator. The simplest approach is best if it achieves the desired result. The interrogator should not be unnecessarily devious. He may outwit himself with his own cleverness or antagonize the subject by creating an unwanted confusion. Ingenuity is desirable when it is required, but it should not be considered as a satisfactory substitute for intelligence. The interrogator must first classify or analyze his subject with the aid of information or criminal records. A preliminary interview will often assist in determining the character and personality of the suspect and in planning the techniques to be used. With experienced criminals, the methods described under *Anxiety* and *The Stern Approach* are more effective, since although this type of person may not be reached by an emotional appeal he will accede to the logical cogency of the case that has already been built up against him by the investigator. With first offenders and those subject to feelings of regret, repentance, and mental anguish, a direct appeal on a friendly basis is more effective. Failing this, they may experience fear and apprehension if the interrogator expresses himself in terms of official indignation. As a general rule, the investigator will find that the direct, friendly approach should be tried first and a gradual progression can be followed to the more complex techniques. This must be qualified by the observation that some of the techniques, such as the pretense of physical evidence, can lose their effect if they are applied at the wrong stage of the questioning. The subject may develop a doubt as to whether there is a strong case against him if widely varying techniques are used. The interrogators should never reveal the weakness of their position by haphazardly testing different techniques. The methods should

be applied economically and with careful planning. It is important to restrict the questioning to at most two interrogators. A multiplicity of interrogators results in neutralizing the effects of various techniques.

6. Interrogation Techniques

There are many techniques of interrogation which the investigator can employ. His choice should depend on the nature of the crime under investigation, the character of the subject and on his own personality and limitations. The following are some of the techniques practiced by experienced investigators.

a. *Emotional Appeals.* The investigator must create a mood that is conductive to a confession. To place the subject in the proper frame of mind, he should provide emotional stimuli that will prompt him to unburden himself by confiding. In achieving this aim, the interrogator must combine the qualities of an actor and a practical psychologist. He must be able to roughly analyze the subject's personality in a short time; decide what motivation would prompt him to tell the truth; and then provide those motives by appropriate emotional appeals.

1) *Sympathetic Approach.* The suspect may feel the need of friendship. He is apparently in trouble. An offer of friendship accompanied by small acts of kindness may win his cooperation. The interrogator understands the plight of the subject. He appreciates the fact that even fellows like the subject become involved in difficult situations. He is ready to listen to the subject's story of his early life and its lack of opportunities. He understands how easy it is for a fellow to become a victim of drink or narcotics. He knows that the subject has merely used bad judgment in the affair and certainly would never again become so involved. Perhaps if he and the subject were to discuss the matter freely they could find an explanation.

After all, it is really a misunderstanding that has arisen. Unfortunately, the affair is technically a violation of the letter of the penal code and the police must comply with certain regulations. We could keep this unpleasantness to a minimum by a candid discussion of the whole affair.

2) *Kindness.* The investigator has appraised the personality of the subject and finds him a normal person in his desire for consideration. Kindness is in order. The investigator knows what it is to be in a spot. How about the family—the subject's mother, wife, or children? Is there anything the subject would wish the investigator to do for them? The subject's employer? The subject's property? His car, for example? Obviously, the subject and the investigator can get along together. Perhaps the investigator can assist the subject in his personal problem? There is no limit to the things that can be achieved by cooperation. We are not alone in this world.

b. *Friendliness.* The simplest of techniques is to assume that the suspect is willing to confess if he is treated in a friendly spirit. This treatment may take several forms which although similar to the emotional appeals described above are not as simple and direct.

1) *The Helpful Advisor.* The investigator is the subject's friend. Between the two of them they are going to straighten things out. The subject is bewildered by the recent happenings. If he explains the whole thing from the beginning, his friend, the investigator, will try to advise him. The investigator understands the law, the district attorney, and police procedures. Who is in a better position to help the subject?

2) *The Sympathetic Brother.* The subject needs to square things with his own conscience. For the sake of his family and himself, he should make a clean breast of the affair. His friend the investigator has seen other persons in similar circumstances. He knows the suspect is

seeking, above all, to achieve peace of mind. He has his whole life ahead of him. With the help of the investigator, he can take the first long step toward rehabilitation—recite the present story from the beginning and reason out the future steps with this as a basis. The investigator wants to give the suspect a chance to help himself.

3) *Extenuation.* The investigator does not take too serious a view of the subject's indiscretion. He has seen a thousand people in exactly the same situation. A rash step taken in an unguided moment; hasty action prompted by other people's advice. Perhaps if the suspect were to give the details of this unfortunate incident, his friend, the interrogator, could present the affair in its true light.

4) *Shifting the Blame.* Obviously, the subject is not the sort of person that is usually mixed up in a crime like this. The interrogator could tell from the start that he wasn't dealing with a fellow who was a criminal by nature and choice. The trouble with the suspect lies in his little weaknesses—he likes drink, perhaps; he is excessively fond of girls; or he has had a bad run of luck in gambling. These things can happen to anyone. Particularly in the present case. The circumstances practically pushed the suspect into the crime. If the subject and the interrogator were to work together, they could present this thing as it really is—a mistake that could happen to anyone. If the complainant and the judge could be assured that the subject was making a clean breast of it and was at least a decent fellow, it is quite possible they would take a different view of the matter. As it is now, there is enough proof to convict him and there is nothing to show the *true* facts of the case. Now if they were to hear the *whole* story . . .

5) *Mutt and Jeff.* In this technique, two agents are employed. Mutt, the relentless investigator, who knows the subject is guilty and is not going to waste any time. He's sent a dozen men away for this crime and he's going to

send the subject away for the full term. Jeff, on the other hand, is obviously a kindhearted man. He has a family himself. He has a brother who was involved in a little scrape like this. He disapproves of Mutt and his tactics and will arrange to get him off the case if the subject will cooperate. He can't hold Mutt off for very long. The subject would be wise to make a quick decision. The technique is applied by having both investigators present while Mutt acts out his role. Jeff may stand by quietly and demur at some of Mutt's tactics. When Jeff makes his plea for cooperation, Mutt is not present in the room.

c. *Anxiety.* The suspect is in a state of emotional confusion. He is unable to think logically and clearly, since his sense of values has been disturbed and his imagination is distorting perspective. It is possible for the investigator to obtain admissions or even a confession from the suspect by further misrepresenting the picture.

1) *Exaggerating Fears.* The interrogator persistently points out that the subject "cannot win." There has never been a perfect crime. The longer he gets by with petty offenses, the more likely it is that he will commit a serious crime and suffer a severe punishment. The subject should consider the damaging effect such action will have on his family. His continued silence will undoubtedly affect his loved ones. The interrogator understands that the subject has no fear for himself, but he must have some thought for his friends or relatives. Their good name and future are at stake.

2) *Greater and Lesser Guilt.* In most crimes, there are several offenses involved. Although the investigator is only concerned with the major offense, he can represent himself as being interested mainly in a minor offense. The subject, who is afraid only of the consequences of the major offense, may resort to cleverness and in an attempt to throw the interrogator off the track or at least to placate him by

throwing him a bone, may confess to a minor offense. Once he has committed himself to this, the ice has been broken and persistence should bring forth a confession of the major guilt. It must be stressed to the suspect that since he has lied about the lesser offense, it is obvious that he has lied about the greater.

3) *Knowledge Bluff.* The interrogator reveals a number of pertinent items of evidence which are definitely known. He is thus able to convince the subject that it is futile to resist since the interrogator obviously has sources of knowledge. The interrogator should prepare himself for this approach by learning a great number of facts about the crime in question and about the subject's background. He must create the impression that he possesses an unlimited store of knowledge. This is not too difficult if the subject is confused and is normally not too bright.

4) *The Line-Up.* Certain crimes such as assault, forgery, and robbery involve an identification. The witness, complainant, or victim is requested to recognize the subject. During a break in the interrogation, the subject is placed among a group of men for a line-up. The witness or complainant (previously coached, if necessary) studies the line-up and confidently points out the subject as the guilty party. He may stress a particular feature for emphasis. The interrogation is resumed as though there were now no doubt about the guilt of the subject. Now it is merely a question of the subject helping himself by "cooperating."

5) *Reverse Line-Up.* This technique is applicable in crimes which ordinarily run in series, such as forgeries and muggings. The accused is placed in a line-up, but this time he is identified by several fictitious witnesses or victims who associated him with different offenses. It is expected that the subject will become desperate and confess to the offense under investigation in order to escape from the false accusations.

6) *Bluff on a Split Pair.* This is applicable where there are accomplices. The two suspects are separated and one is informed that the other has talked. Another variation, one which is less likely to run aground as a bluff, is to obtain individual, detailed stories from each suspect, no matter how fanciful or erroneous they may be, and to play the discrepancies against each suspect's story. A stronger form of this technique is to pretend to the suspect that his accomplice is placing all the blame on him. It is then suggested that the suspect would be foolish if he did not protect himself by telling the truth. Inbau describes an effective form of playing one suspect against the other. Let us assume that there are two suspects, *A* and *B*, and that *A* has been interrogated without success. *A* is then seated in the outer office which is occupied also by a busy stenographer. *B* is taken into the interrogation room and we shall assume that he too is unsuccessfully interrogated. The interrogator orders the stenographer to come into the interrogation room with his pencil and notebook. After an appropriate period of time, the stenographer returns and begins to type from his notes. Various touches of realism are added. The stenographer wishes to know *A*'s address; he is requested to hurry, since signatures are needed. Subsequently, *A* is returned to the interrogation room which *B* has now left. He is viewed with a grave silence. The interrogator opens with: "I don't think we'll need any confession from you, but if you want to clear up a few points. . . ." He is then asked to verify one or two points about which the interrogator has certain knowledge.

d. *The Stern Approach.* A cold, aloof attitude may sometimes produce the desired results. Techniques classified under this heading are often designed to induce the effect of anxiety as described in the preceding paragraphs. Many types of suspects are in fear of the police and the police station. Their confidence is shaken if they are faced by a stern investigator. His very coldness upsets any pre-

conceived notions of "kid gloves" treatment. A judicious application of the following techniques may induce dismay and cause him to plead with the interrogator. They should, however, be used only if it is highly probable that the subject is guilty.

1) *Pretense of Physical Evidence.* The interrogator states that he does not need any confession and isn't particularly interested in the suspect's reasons. There are, however, a few formalities he must go through. He is required to inform the suspect of certain findings and give him an opportunity to explain certain evidence. The interrogator then pretends that certain physical evidence, appropriate to the case, has been found by laboratory experts. The average person has mystical notions of the power of scientific crime detection and will accept practically any claims that science may make. Thus the detective can mix pseudoscience in his statements. In a hit-and-run case, for example, the interrogator can suggest that blood has been found on the car and that the laboratory experts have determined it to be the victim's blood. In a homicide, the interrogator can refer to hair found at the scene of the crime, which can be shown, under the microscope to be the suspect's hair. For added realism, the suspect can be invited to look into the microscope. In a document case, such as a forgery or a threatening letters case, a comparison of handwriting can be represented as being conclusive. Fingerprints are the most effective form of evidence. The layman believes that they can be left on any object. The investigator should select some object which was known to have been touched and should face the suspect with the object. It does bear fingerprints and the fingerprints have been photographed. The interrogator can show at a discreet distance a small photograph of a latent fingerprint. The imaginative investigator can create his own dramatic effects such as having the interrogation interrupted by the delivery of a message to the effect that the fingerprints on the

weapon have been identified, or that the handwriting has been positively compared.

2) *Jolting.* This device is especially useful when dealing with a person unusually calm or nervous. The questioning is conducted at some length in a quiet, almost soothing manner. By constantly observing the suspect, the investigator chooses a propitious moment to shout a pertinent question and appear as though he is beside himself with rage. The subject may be unnerved to the extent of confessing. If he appears moved, the interrogator will work him up to a pitch with a climactic series of questions.

3) *Indifference.* The investigator is not particularly interested in the subject. The subject's conviction is treated as a *fait accompli.* There are witnesses and physical evidence. There is an absence of an alibi. The subject's behavior during the period in question is an open book to the police. To accomplish this effectively, the interrogator should discuss the case with another investigator in the presence of the subject. The purpose of the discussion is ostensibly to determine whether they can obtain a conviction for a greater crime or whether they can obtain the maximum sentence. They review the case by putting the worst construction on every aspect and expressing their annoyance at being put to this inconvenience. The aim, of course, is to induce the subject to plead with them. Only with extreme reluctance do they give any consideration to his pleas. Gradually, they become more "reasonable."

4) *Questioning as a Formality.* In this technique, the interrogator asks a series of questions as though it were a necessary formality in his routine duty. He give the impression that he knows the answer, but that he is required to ask the question in consideration of the rights of the accused. The procedure is business-like, but the interrogator pauses meaningfully as if to give the suspect *one more* chance to tell the truth. Such phrases as the following can

be used; "You were in the apartment at seven o'clock, weren't you?" "You're sure about this fact?" "Do you want me to write your answer exactly the way you said it?" "I'm going to give you a fair chance to answer this question truthfully. Think it over for a while; then, give me your answer." When the answer is not that which the interrogator expects, he puts down his pencil skeptically, looks at the suspect, stares at his note pad and shakes his head ruefully. He may make some remark such as, "I don't know what you're trying to do to yourself," or "You think you'd give yourself a break." A prolonged silence will work with equal effectiveness.

5) *Affording an Opportunity to Lie.* This technique is useful when the interrogator has used direct questioning about the crime without success. It is lengthy, time-consuming and involved, but it serves the purpose of wearing down the subject. Questions directly concerning the crime are avoided. In a cold methodical manner the interrogator first asks for detailed information concerning the subject's background. If he has knowledge of some indiscretion, he dwells around the event in great detail. He then proceeds to the activities of the subject before and after the crime in question. He goes into minute details concerning money, movements, and conversations. He repeats and re-examines until he has built up a complete structure. He supports his questioning with his own knowledge of certain facts or events. Having reached this point, the investigator leans back and in a relaxed tone, invites the subject to tell in his own words all that he knows about the offense, the victim, the complainant, possible suspects, and the circumstances surrounding his involvement in the case. From all of this information, a capable investigator will be able to detect weak points such as lies, inconsistencies, improbabilities, and gaps. He should be patient, methodical, and aloof, willing to go over the events again, step-by-step and in minute detail in order to "get the facts straight" for his report.

The subject will, ordinarily, continue to answer questions, since he cannot know that all this information is not necessary for an investigative report. He is willing to assist the interrogator in developing his report. The interrogator gives the impression that he is not interested in guilt or innocence; he wishes only to obtain details for his report. No person, obviously, should prevent the police from accomplishing their report by refusing to answer routine questions. Finally, the investigator will have acquired an immense, complex, but not quite coherent structure of facts, data, descriptions, and events. It should not be difficult to discover a number of lies in this welter.

At a "psychological moment" when the subject appears confused and dispirited another tack can be taken. The investigator can suddenly become overwhelmingly indignant, throw down his pad and pencil and demand the truth forthwith. On the other hand an associate investigator can take advantage of a pause, in private, to suggest to the suspect that he can "straighten things out" by forgetting all these details and getting down to a few simple admissions. Alternatively, the detailed questions can continue and the discrepancies can be pointed out in an assured and determined manner.

7. Control

One of the first lessons to be learned by the inexperienced investigator is the unfortunate ease with which he can lose control of the interrogation. As he questions the suspect, unexpected answers are received and his strategy is pushed off its course. Startling emotional reactions on the part of the suspect may upset him. He may become impatient in the face of obstinacy or angry with the appearance of impertinence. With the tone of the interrogation changed and the sequence of his presentation altered, he may find himself caught in a discouraging stalemate. Although experience will remedy these defects, initial train-

ing according to sound principles will enable him to avoid the pitfalls at the outset.

a. *Initial Phase.* In the beginning of the typical interrogation the investigator has little need for control. The subject should be permitted to tell his story in his own way without interruption. A few general questions will lay the groundwork. Often the suspect, after he is once launched in his narrative, will work himself into a confession. At this stage the investigator should restrict himself to assisting the subject when there is an obvious need for a word or phrase.

b. *Questioning.* After the narrative phase of the interrogation, planned questions should be put to the subject. The tone of the interrogation will now be set by the responses of the subject. Spontaneous answers which appear to be given without much reflection are particularly valuable and trustworthy. If the subject appears to be cooperating, the investigator should endeavor to develop in him a pride in his cooperation.

c. *Emotion Control.* If the subject seems reluctant to cooperate, the investigator should make every effort to remain clean. A loss of temper will cut off the small trickle of information. Anger may swiftly lead to duress. The suspect, moreover, will sense his own superiority in remaining calm. Deliberate anger as a tactic in interrogation is, of course, a different matter. Harassing the suspect should ordinarily be avoided since it can result in false statements. It is always possible that the suspect does not have the information. The indifferent type may give the desired answer regardless of its truth merely to be rid of the oppression of the interrogator. Instead of yielding to feelings of contempt, impatience, sarcasm, or anger, the interrogator can find relief in putting his efforts into the expression of emotions or sentiments such as patriotism, motherhood, childhood, religion, or fidelity to ideals.

d. *Strategic Interruptions.* When the interrogator senses that he is losing control or that his tactics are availing nothing, it may be time to pause and do additional planning or introduce a new technique. The interrogation room should be equipped with a button and buzzer under the top of the desk, which the investigator can push with his knee or foot. In this way, he can sound the buzzer, pretend it is a signal for him and leave the room.

8. Physiological Symptoms

Careful observation of the physical state of the subject as influenced by his emotion will often give a clue to guilty knowledge or deception. The various symptoms observable in the subject are sometimes consistent with a state of nervousness as well as guilt. Physical manifestations can be pointed out to the suspect as evidence that his guilt is obvious. The following observations are generalities which may sometimes be useful, but which must always be modified in relation to the temperament of the individual.

a. *Sweating.* If the face is flushed, anger is indicated. Embarrassment or extreme nervousness may also be the case. A pale face indicates fear or shock. Sweating hands indicate tension.

b. *Color Changes.* A flushed face indicates anger, shame, or embarrassment but not necessarily guilt. A pale face is a more reliable sign of guilt.

c. *Dry Mouth.* Great nervous tension is present. This is considered a reliable symptom of deception. Swallowing, wetting of the lips, and thirst are indications of dryness of the mouth.

d. *Pulse.* An increase in the rate of heart beat is indicative of deception. The pulse beat is observable at times in the veins of the neck.

e. *Breathing.* Deception is indicated by an effort to control breathing during critical questions.

9. Perseverance

In the preceding paragraphs emphasis has been placed on kindness and stratagems. The investigator will, however, encounter many situations where the sheer weight of his personality will be the deciding factor. Where emotional appeals and tricks are employed to no avail, he must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours pausing only for the subject's necessities in acknowledgment of the need to avoid a charge of duress that can be technically substantiated. In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination. It is possible in this way to induce the subject to talk without resorting to duress or coercion. The method should be used only when the guilt of the subject appears highly probable.

10. Special Groups

Two groups of offenders deserve special mention here because of the relative ease with which they may be induced to make confessions if they are interrogated with a moderate amount of skill.

a. *The Juvenile.* Two classes must be distinguished: the indignant offender with bad character and disreputable background and the person who comes from a "good family." The expressions "criminal" and "non-criminal" type will be employed.

1) *Non-Criminal Type.* The boy (or girl) has been raised to believe in moral principles and to respect authority, but is a little wild and has yielded to temptation; he is rarely intelligent and his inexperience makes him gullible.

He is susceptible to emotional appeals by reason of his training and "believes" in so many things that the investigator has a wide choice of methods by which to motivate him. "Mother" is a magic word for inducing a state of repentance and a desire for confession. Since the boy is usually frightened at the outset, the investigator can rely on a friendly approach and an emotional appeal.

With a headstrong boy, an investigator should carefully avoid humiliating him by compromising his courage or pride. Lacking common sense and being careless of the consequences, he may rebel at an affront and remain obdurate. A friendly appeal to his manhood is effective. Is he man enough to admit his guilt? What would his mother think of him? How can he and the investigator cooperate so that mother won't be hurt? What should we tell mother?

2) *The Criminal Type.* Where poverty and bad environment have wrought their scars on the boy's character, the investigator's greatest problem is prevarication. The lie is an integral part of the mode of the subject's thinking. Another difficulty is a reluctance to become a "stool pigeon," attended by a heroic silence. An aggravated form of this attitude is an excessive dislike of "cops." The fine arts of detective fiction and mystery cinema have inculcated in the boy the notion that there is no profession lower than that of the cop. The police officer is his natural enemy.

Although emotional appeals are far less effective with this type of subject, they should be given a trial at the outset. The friendly approach should be used throughout. The utmost care must be exercised to avoid permitting the boy to assume the role of a martyr. If the investigator is harsh, fancied martyrdom is simple to conjure up. On the other hand, where the investigator is persistently friendly, even to the point of fatuity, the boy will feel foolish in maintaining an air of a rebel without a cause. The stern approach should be used as a last resort.

The investigator must rely heavily on the tactic of trapping the subject in ridiculous lies. The boy has no desire to lose face in such an ignominious way as being repeatedly caught in contradictions and inconsistencies. After he has been caught in a number of lies, it should be suggested to him that he "smarten up." Naturally, in the half-fictional world that he mentally inhabits, it is of the utmost importance to be "smart." Not even the movies admire the "dumb" thug.

The appeal to his pride in being "smart" should be used again by pretending that his friends or accomplices have "talked" and told everything. Is he going to hold the bag? Since Bogart, Cagney, Robinson and Raft are never seen holding the bag, there is little likelihood that the subject will fancy himself in such a position. He will wish to "get revenge on them." With the aid of the investigator, this is a relatively simple matter. After all, the investigator has no desire to see his friend, the subject, shouldering all the blame.

b. *"White Collar" First Offenders.* This category includes persons such as the grocery clerks or bank cashiers who came from "poor but honest" parentage; middle-class offenders such as office managers and owners of small businesses; military officers; teachers; civil service workers; and other groups who are traditionally known to subscribe to orthodox ethical principles and conventional moral standards. The crime is usually larceny by theft, forgery, or embezzlement. Rarely it is murder or robbery. It is not difficult to obtain a confession. The personal dignity and pride of the subject must be respected. If these are assaulted by a crude remark, the subject may rebel and remain obstinate. The calm, dignified approach of a physician will lull the subject's fears and lead him to believe that if he cooperates the road will be smooth. Since he is usually naive and knows little of the seamier side of life, his conception of his fate will be unrealistic. The investi-

gator should begin with the "Dutch Uncle" approach. His job is to help people in trouble. He has seen cases like this before and things have worked out smoothly. He knows what the subject has done; that's a thing of the past. "Let's see what we can do about the future. First of all, we'll clear the decks. Tell us in your own words what happened and give us everything that's in your favor so that we can do what we can for you. And stop worrying. Let us do the worrying about the case. If we all cooperate, we can get somewhere." A psychological "lift" such as this is like a sedative before an operation. Things aren't half as bad as he had imagined them. It's good to find that they have intelligent men on the police force. . . . The character of a person in this category is weak, and this defect must be exploited fully.